United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Docket No. **76-1237**

To be argued by
George W.F. Cook

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA

Appellee

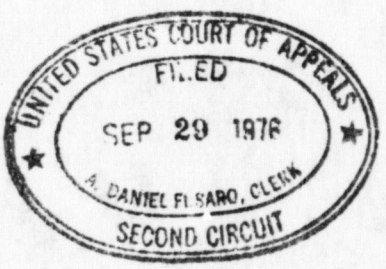
v.

JOSEPH FALCONE and
JOSEPH CURRERI

Appellants

Appeal from the United States District
Court for the District of Vermont

BRIEF FOR THE UNITED STATES



GEORGE W.F. COOK
United States Attorney

JEROME F. O'NEILL
Assistant U.S. Attorney
District of Vermont

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IN THE

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STATEMENT OF THE CASE

Defendants were each found guilty by a jury under Counts I, II, III, IV and V of an Indictment at

a trial held at the United States Court House in Burlington, Vermont from February 4, 1976 through February 13, 1976, before the Honorable Albert W. Coffrin, Judge of the United States District Court for the District of Vermont. The superseding indictment filed November 12, 1975 charged in Count I that the defendants on January 31, 1974 knowingly and fraudulently did conceal from a trustee in bankruptcy, and creditors thereof, property valued in excess of $100,000.00, in violation of 18 U.S.C. sections 152 and 2. (See Gov't. App'x. p.1 for the superseding indictment. Defendants' App'x., A-7 to A-16, sets forth an indictment which was superseded.)

Count II charged defendant Joseph Falcone, aided and abetted by defendant Joseph Curreri, did make a false oath and account as to a material matter in bankruptcy proceedings by Falcone subscribing and swearing to a document known as a Statement of Affairs, wherein Falcone knowingly and fraudulently failed to disclose assets of the bankrupt in excess of $100,000.00, in violation of 18 U.S.C. §§ 152 and 2.

Count III charged that on or about January 31, 1974, defendant Falcone, aided and abetted by defendant Curreri, and in contemplation of bankruptcy, and with intent to defeat the bankruptcy laws, knowingly and fraudulently did transfer and conceal property in excess of $100,000.00, in violation of 18 U.S.C. §§ 18 and 2.

Count IV charged that on January 31, 1974, defendants Falcone and Curreri did knowingly and fraudulently cause the making of a false entry in a document affecting and relating to the property and affairs of the bankrupt, in violation of 18 U.S.C. §§ 152 and 2.

Count V charged the defendants with a conspiracy to violate the bankruptcy laws, that is, § 152 of Title 18, as set forth in the first four counts.

On April 19, 1976, defendant Falcone was sentenced to three years imprisonment and a $2,000 fine on each of five counts, the sentences to run concurrently. Defendant Curreri was sentenced to three years imprisonment and a $500 fine on each of five counts, the same to run concurrently.

Thereafter, on April 19, 1976, the defendants filed a notice of appeal.

STATEMENT OF ISSUES

STATEMENT OF FACTS

In a light most favorable to the Government, the jury could have found the following facts: (hereinafter, A.refers to "Appendix," Tr. refers to "Transcript," G.A. refers to Government's Appendix," Tra refers to Transcript of hearing, February 4, 1976 (Document #60), and Trb refers to Transcript of hearing, January 5, 1976 (Document #59).

At all times material herein, defendant Joseph Falcone was an officer of Falcone Dairy Products, Inc. of 2518 West Third Street, Brooklyn, New York, and the vice-president of Alburg Creamery, Inc., Alburg, Vermont, (hereinafter referred to as "Alburg" or "Alburg Creamery") a wholly owned subsidiary corporation of Falcone Dairy Products, Inc. Defendant Joseph Curreri, at all times material herein, was the business manager of Falcone Dairy Products, Inc. (hereinafter referred to as "Falcone Dairy.")

Alburg Creamery came into existence in Alburg, Vermont in 1970 (Tr.106, Gov't.Ex.60) as a subsidiary of Falcone Dairy. (Tr.105) Its product was the manufacture of mozzarella cheese. (Tr.105) Prior to incorporation, Alburg Creamery had operated since 1965 as a branch of Falcone Dairy. (Tr.106,107)

Leo Laramee, a cheesemaker since 1941, (Tr.101) was hired by Falcone Dairy (Tr.103) in 1965 (Tr.105) to manage and operate Alburg Creamery. (Tr.108) Percy Sheltra of Milton, Vermont (A.120, Tr.177) was the manager of Milton Cooperative of Milton, Vermont (A. 121, Tr.178), an association of farmers in operation since 1919 (A.122, Tr.179), which marketed milk and cheese. (A.120-124, Tr.177-181) Milton Cooperative was instrumental in 1965 in getting Falcone Dairy to set up a cheese producing plant in Alburg, Vermont. (A.123, Tr.180) Milton Dairy donated an old building to Falcone Dairy at Alburg, Vermont, which was located 24 feet behind the milk receiving station of Milton Dairy, located at Alburg, Vermont. (A.180, Tr.180) This building was renovated by the Falcones and became the Alburg Creamery cheese production plant operated by Leo Laramee. (A.122-124, Tr.179-181) In 1965 and thereafter, Milton Dairy had an agreement with Falcone Dairy to provide Alburg Creamery with all of Milton's whole milk not sent to market as Class I milk. (A.124, Tr.181) This milk was piped from Milton's Alburg milk receiving station some 20-30 feet to the Alburg Creamery plant for the purpose of supplying Alburg Creamery with its source of milk for the production of mozzarella cheese. (A.124-125, Tr.181-182)

From its inception in 1965, the Alburg Creamery plant shipped its mozzarella cheese to Falcone Dairy at Brooklyn, N.Y. (Tr.105) Between 1966 and 1968, or thereabouts, Alburg Creamery, and particularly its manager, Leo Laramee, received complaints from Falcone Dairy, from time to time, that the mozzarella cheese had a "fishy" taste. Leo Laramee described the 1966-1968 problem as being caused by Alburg Creamery's use of village or lake water which from time to time contained "little fish or polliwogs," which appeared while the cheese was being cooled in lake water (G.A.28, Tr.125).

The "fishy cheese" problem was caused by the village of Alburg water supply (G.A.28, Tr.125), the water intake being "too close to the shore." (G.A.29, Tr.126) This problem of "fishy cheese" went on for a year or two, terminating when the village of Alburg extended its water intake into the lake. (G.A.29,31, Tr.126,128) There were no more problems with fishy cheese after Alburg extended its water intake pipe (G.A.31, Tr.128). Thereafter, in 1969, (G.A.34, Tr. 825) Alburg Creamery built a well for the purpose of using well water for the production of cheese. (Tr.128) There was definitely no further problems with fishy cheese after Alburg Creamery started using well water in 1969. (G.A.31, Tr.128) (G.A.35, Tr.826) In its

entire period of operation, Falcone Dairy returned over-ripe or defective cheese to Alburg Creamery on only one occasion (A.112, Tr.169,87,134).

About 1971, Lucille Farm Products, Inc. of Bronx, New York (A.270, Tr.397,398,591), obtained an option to buy into Alburg Creamery (Tr.405). Under the terms of this option, Lucille Farm Products, Inc. was to get one-half of the cheese production of Alburg Creamery for a trial period of one year, mostly during the period 1971 (Tr.590). The President of Lucille Farm Products, Philip Faliveni, spent much of the year 1971 at Alburg Creamery (Tr.590) in Alburg, Vermont, checking on his corporation's interest under the option agreement (Tr. 590,592). Eventually, Faliveni, on behalf of Lucille Dairy, failed to exercise the option because Faliveni believed that Lucille was not getting its half of the cheese production of Alburg Creamery (Tr.592-593).

During 1971, Lucille probably received between $800,000 and $1,200,000 worth of mozzarella cheese from Alburg Creamery. The Accounts Payable book of Lucille (Gov't.Ex.73) showed that out of this purchase of cheese of approximately one millio dollars in 1971 from Alburg, Lucille took only $1,900 in credits against Alburg on the cheese shipped from Alburg (Tr.600), and there was nothing in this Accounts Payable book which indicated the credit was due to bad cheese.

After Lucille discontinued its connection with Alburg Creamery around the end of 1971, Alburg Creamery continued to ship all of its cheese to Falcone Dairy or its customers. Commencing in 1973, Falcone Dairy was running behind in its payment to Alburg Creamery for cheese. (Tr.118) Leo Laramee took up the matter of late payments from Falcone Dairy with defendant Falcone during the first six months of 1973 (Tr.119). Milton Coop stopped shipping milk to Alburg Creamery on occasions because Alburg Creamery had no money to pay for milk, due to the failures in payment by Falcone Dairy. (Tr.120) On June 11, 1973, Leo Laramee resigned as manager of Alburg Creamery because of the "conditions that existed there," namely, because Falcone Dairy was not paying Alburg's invoices for cheese, (Tr.116) and Laramee's concern that Alburg Creamery would not meet standards imposed by the Vermont Board of Health (Tr.839).

Alburg Creamery continued to produce cheese for another month after Laramee's resignation until a fire completely destroyed its plant at Alburg on July 13, 1973. (A.107,128, Tr.164,184) At the time of the fire on July 13, 1973, Falcone Dairy owed Alburg Creamery for cheese somewhere between $172,000 (A.172-173, Tr.299-300)

and $284,942.31 (Tr.458).* Most of the books of Alburg Creamery were destroyed in the fire.

Following the ceasing of Alburg's operations on July 13, 1973, until December 12, 1973, Attorney Joseph Wool of Burlington, Vermont, represented the defendants' interests (Tr.382). Per instructions from defendant Falcone (Tr.390), Attorney Wool attempted to have Alburg's creditors accept a proposal which in substance was an unsecured promise to pay off Alburg's indebtedness to the creditors over a period of five years (A.263, Tr.390,Def.Ex.H). The proposal was not accepted, and on December 12, 1973, one of the creditors, National Farmers Organization, filed an involuntary petition in bankruptcy against Alburg Creamery (Tr.44, Gov't.Ex.53). Alburg Creamery was adjudicated a bankrupt on January 22, 1974 (Gov't.Ex.55), and on the same date was ordered to file a Statement of Affairs (Gov't.Ex.56). Thereafter, on February 14, 1974, the Statement of Affairs of Alburg Creamery, Government's Exhibit 60, set forth in Government's Appendix, p.10, was filed in Bankruptcy Court. The Statement of Affairs was executed on behalf of Alburg Creamery by defendant Joseph Falcone, its vice-president, and sworn to before Attorney Joseph Wool of Burlington, Vermont,

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*Agent Axten testified that using Alburg's books not destroyed by fire, and figures for cheese shipped and payments made by Falcone, he concluded Falcone owed Alburg $284,942.31.

the same attorney mentioned above. (Gov't.Ex.60, G.A.10-27) Thereafter, Attorney Ronald Schmucker of South Burlington, Vermont, was appointed trustee in bankruptcy (Tr.42).

Schmucker assumed his duties as trustee. (Tr.42-54) Schmucker as trustee became familiar with Alburg's Statement of Affairs (Gov't.Ex.60, G.A.10,27), and accepted the debits and credits which Alburg Creamery had with Falcone Dairy as the same were set forth in the Statement of Affairs. (Tr.47) In this regard, the Statement of Affairs failed to set forth the credit which Alburg Creamery had against Falcone Dairy (Gov't.Ex.60, G.A.19). Schedule B-3 (G.A.19) relating to debts due Alburg Creamery on open account, specifically stated "NONE" due, and the page is subscribed to by defendant Joseph Falcone (G.A.19). No mention is made thereon of any $172,000 - $284,942.31 due from Falcone Dairy. Instead, defendant Falcone, in the Statement of Affairs, on Schedule A-3 thereof (G.A.13), lists Falcone Dairy as an unsecured creditor of Alburg Creamery in the amount of $48,709.31. (Gov't. Ex.60, G.A.13)

As stated above, the bankrupt estate was administered by Trustee Schmucker without knowledge of the assets of Alburg Creamery in the amount of $172,000 - $284,942.31 representing the amount due Alburg Creamery for cheese delivered Falcone Dairy in 1973 as set forth above. (Tr.47) Eventually, the unsecured creditors were paid a dividend obtained largely from the proceeds of a fire insurance policy, which was estimated to be between 30% and 40% of their claims. (Tr. 50,52)

Defendants Falcone and Curreri were each interviewed by F.B.I. agents concerning any explanation that the defendants could provide for the failure of Alburg's Statement of Affairs to list Falcone Dairy as a debtor of Alburg Creamery in the amount of $172,000 - $284,942.31. (Tr.441-503) Defendants Falcone and Curreri were similarly given an opportunity to explain this aspect of the Statement of Affairs to the Grand Jury. (A.329-354, Tr.505-529) On each occasion, the defendants' explanation was substantially as follows: that on the day of a hearing before the Bankruptcy Court around January 31, 1974, at the Federal Court House in Burlington, Vermont, (A.347, Tr.522) defendant Curreri, in defendant Falcone's presence, informed Attorney Wool

that Falcone Dairy had never charged Alburg Creamery for "bad cheese" delivered by Alburg Creamery to Falcone Dairy during the last six months of 1971. (A.347,339,253,345, Tr.522,514,380,520); that following this discussion with Attorney Wool, Wool advised Falcone and Curreri that based on the fact that Falcone had received "bad cheese" from Alburg Creamery in 1971, that Falcone could take the credit for bad cheese in 1974 in its Statement of Affairs of Alburg. (A.254, Tr.381) Defendants Falcone and Curreri also presented the same set of facts to their accountant, Mario Accardi, who similarly stated that the credit for bad cheese in 1971 could be taken on the Statement of Affairs in 1974. (A.161-162, Tr.287-289)

Both before the Grand Jury and in interviews with the F.B.I., defendants Falcone and Curreri claimed that the 1971 "fishy, rancid cheese" problem was caused by using lake water in the manufacture of Alburg's cheese, and because of this, a well was dug at Alburg which more or less eliminated the problem. (A.338,345, 346, Tr.439,443,513,520,521) At the trial, the Government produced testimony from the well-digger, Edward Feeley, (Tr.237-244) that the well was dug in May

of 1969, and also produced testimony from Alburg's manager, Leo Laramee, and his son, Warren Laramee, that the "fishy cheese" problem definitely was eliminated by the drilling of the well in 1969.

Thereafter, defendant Curreri drew up schedules of "bad cheese" shipped from Alburg Creamery to Falcone Dairy during the last six months of 1971 (A.345, Tr.520), which totaled approximately $210,000. (A.342,352,353, Tr.517,527,528,438, Gov't.Ex.72, G.A.9) This claimed credit for "bad cheese" in 1971 was given to Mario Accardi, the accountant for Falcone Dairy, who entered this credit of "$210,711.05" at page J-12 of Government's Exhibit 43 (G.A.9 on January 31, 1974, the combined General Ledger and General Journal of Falcone Dairy (A.157, Tr.28[illegible]. This entry of $210,711.05 by Accardi was made on instructions from defendants Falcone and Curreri (A.162,174, Tr.289,301), and was based on Falcone and Curreri's Statement that Falcone Dairy had credits for "bad cheese" in this amount. (A.161, Tr.287) Accardi knew that the taking of this credit against Alburg Creamery wiped out the $172,000 plus debt due Alburg Creamery from Falcone for

cheese shipped in 1973 (Tr.291,300). The entry for "bad cheese" had the effect of making Alburg Creamery a debtor of Falcone Dairy, instead of a creditor for $172,000 (A.173, Tr.300), and likewise removed a $172,000 asset of the bankrupt estate of Alburg Creamery, thereby depriving its creditors of a further asset. (Tr.42-53)

The defendants claimed Falcone Dairy was in poor financial condition at the time of Alburg Creamery's bankruptcy. The undisputed proof was that Falcone Dairy had never filed for, or been placed in, bankruptcy (A.227,464, Tr.354,716).

POINT I

THERE WAS SUFFICIENT EVIDENCE FOR THE TRIAL JUDGE TO SUBMIT THE CASE TO THE JURY UNDER THE STANDARDS SET FORTH IN UNITED STATES v. TAYLOR, 464 F.2d 240 (2d Cir. 1972)

The defendants Falcone and Curreri were found guilty by the jury of five counts of bankruptcy fraud under 18 U.S.C. §§ 152 and 2. The substance of each count was that the defendants had knowingly concealed from the trustee in bankruptcy and creditors of Alburg Creamery of Alburg, Vermont, property consisting of accounts receivable of Alburg, valued in excess of $100,000. (See Gov't. App.,p.1 for the superseding indictment. Defendants' Appendix, A.7-A.16, sets forth an indictment which was superseded.)

The defendants contend in Point I of their brief that the trial judge erred in refusing to grant a motion for acquittal and in submitting the case to the jury. It is pointed out that the Government's evidence was largely circumstantial.

The standard in this Circuit to be used by the trial judge in determining whether to permit a case to be decided by the jury was set forth in United States v. Taylor, 464 F.2d 240,243 (2d Cir. 1972) quoting Curley v. United States, 160 F.2d 229,232-233 (D.C. Cir. 1947), cert. denied, 331 U.S. 837 (1947):

> The true rule, therefore, is that a trial judge, in passing upon a motion for a directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion; or, to state it another way, if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt, the motion must be granted. If he concludes that either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, he must let the jury decide the matter.

The Court in Taylor clearly focused on the fact-finding function of the jury:

> . . .But if a reasonable mind might fairly have a reasonable doubt or might fairly not have one, the case is for the jury, and the decision is for the jurors to make.

Taylor at 243, quoting Curley at 932.

The jury is to consider all the evidence introduced, direct as well as circumstantial, United States v. Bowles, 428 F.2d 592, 597 (2d Cir. 1970), cert. denied, 400 U.S. 928 (1970), and all reasonable inferences therefrom. Taylor, supra, at 244-5. The same standard as this Court stated in Taylor, supra, applies where circumstantial evidence of guilt is presented:

> We in no way subscribe to the doctrine that "where the Government's evidence is circumstantial it must be such as to exclude every

> reasonable hypothesis other than that of guilt," which continues to be frequently urged by defense lawyers despite the Supreme Court's repudiation of it in Holland v. United States, 348 U.S. 121, 139-140, 75 S.Ct. 127, 137, 99 L.Ed. 150 (1954).
>
> As this Court stated in Bowles, supra:
>
> Circumstantial evidence is of no less probative value than testimonial evidence . . . The question is always whether the jury may rationally and logically infer the ultimate fact to be proved from basic facts, whether established by circumstantial or testimonial evidence and the surrounding circumstances of the case.
>
> 428 F.2d at 597.

The evidence, viewed in the light most favorable to the Government, as must be the case, Glasser v. United States, 315 U.S. 60, 80 (1942); United States v. Marrapese, 486 F.2d 918, 921 (2d Cir. 1973), cert. denied, 415 U.S. 994 (1974), was clearly "sufficient . . . from which the jury could properly find or infer, beyond a reasonable doubt, that the accused is guilty." United States v. Glasser, 443 F.2d 994, 1006 (2d Cir.), cert. denied, 404 U.S. 854 (1971), quoting American Tobacco Company v. United States, 328 U.S. 781, 787 (1946).

The Government's evidence, largely circumstantial, tended to show that the credit for "bad cheese" knowingly taken by defendants Falcone and Curreri, was a false

credit because the only reasonable inference to be drawn from the credible evidence was that the "bad cheese" did not exist.

As noted in the Statement of Facts, supra, Falcone and Curreri gave substantially the same explanation before the Grand Jury and to F.B.I. agents and to their attorney and accountant regarding the claimed credit of Falcone Dairy for the sum of $210,000 of "rotten, rancid, defective, fishy cheese" delivered by Alburg Creamery to Falcone Dairy during the last six months of 1971, namely, that customers of Falcone Dairy, during the last six months of 1971, returned more than 400,000 pounds or $210,000 of "defective" Alburg cheese, which was 40% of all cheese delivered by Alburg Creamery during the 1971 period; that the defective cheese was caused by the lake water used at Alburg in its production of cheese; that Falcone Dairy had to credit their customers with this sum of $210,000; that this sum of $210,000 was a complete loss to Falcone Dairy, properly chargeable to Alburg, but that Falcone Dairy did not charge the credits against Alburg in 1971 since Alburg could not have sustained the loss; that after the bankruptcy proceedings commenced in December 1973, Falcone and Curreri brought the matter of the

1971 "defective cheese" credits to the attention of their attorney, Joseph Wool, and accountant, Mario Accardi, each of whom advised the defendants that if the 1971 cheese credits were valid, these credits of $210,000 could be taken against Falcone Dairy's admitted liability to Alburg for $172,000 for recent deliveries of cheese, thereby causing Falcone Dairy to be listed as a creditor of Alburg instead of a debtor to the amount of $172,000. (See Statement of Facts, above)

The Government's evidence tended to show that the above explanation of Falcone and Curreri was a false exculpatory statement and that the "bad cheese" on which the credits were based did not exist. In this regard, the Government's evidence was as follows:

That the only "bad cheese" problem in the nature of defective cheese which existed at Alburg occurred around 1966 or 1967 and was definitely eliminated in 1969 when Alburg Creamery commenced using well water and discontinued using lake water; that Alburg Creamery, per its manager, Leo Laramee, and his son, Warren, the cheesemaker, testified that after 1969, Alburg never received any complaints from Falcone Dairy that Alburg had shipped Falcone "fishy, rancid cheese"

claimed by the defendants in asserting the 1971 credit. This testimony of the Laramees contradicted sharply the testimony of defendants Falcone and Curreri, and the jury obviously credited the testimony of the Laramees and discredited the testimony of the defendants. The Laramees testified that there was no "fishy, rancid cheese" problem in 1971, and that neither defendant Falcone nor Curreri had complained to them of a problem, by telephone, letter or in person. (A.31,34,38,41, Tr.128,825,829,832,851,852) Conversely, defendants Falcone and Curreri testified that they made repeated complaints to the Laramees. (A. 428,429, G.A.64-68, Tr.680,681,805-809)

The defendants' explanation was further discredited by the Government's evidence that during the same period in 1971, July-December, when the defendants Falcone and Curreri claimed over 400,000 pounds, nearly one-half of the cheese shipped to Falcone Dairy, was defective and unusable, Lucille Farm Products, Inc. of Bronx, New York, who obtained the other one-half of Alburg's cheese production, claimed only about $1,900 in credits against Alburg for the entire year of 1971, none of which was specifically attributable to bad cheese.

The defendants' explanation was further discredited by the Government testimony that nowhere in the account books of Falcone Dairy did the $210,000 plus in credits reflect that the same were chargeable against Alburg,* or that the same were due to bad, defective, fishy cheese, as claimed by the defendants. The defendants had claimed that the credit entries in Government's Exhibit 44, Falcone Dairy Products Sales Book, appearing in red ink, and totaling some $210,000

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*In this regard, defendant Curreri testified:

Q. Is there any document in all of these records which says there is $210,000 worth of credits which Falcone Dairy can assert at any time against Alburg Creamery during the period that the credits were taken, or at any time prior to approximately January 31, 1974?

A. No, there is no document to that effect.

* * *

Q. Anybody looking at the books from June of 1971 until you get to January of 1974 would never know--I am not talking about people in the business--anybody looking at the books would never know that you had $210,000 worth of credits which you could assert against Alburg Creamery at any time, is that true?

A. That is true.
(G.A.46-47, Tr.787,788)

for the last six months of 197., represented the rotten, fishy cheese from Alburg which had been returned from Falcone's customers. However, Falcone's accountant, Mario Accardi, stated that these red entries were normally merely returned cheese, a price adjustment or an allowance. (Tr.292) One of the Government's major witnesses, F.B.I. Agent Albert O. Axten, testified that there was no way from the sales book to tell what the red entries were for. (Tr.502) Axten further testified that if a credit is deferred from one year to another, within the accounting profession, a deferred entry is made, thereby making a record of the credits. (Tr.502) This was not done on Falcone's books.

At the close of all the evidence, the substance of defendants' argument in Point I of their brief was presented to the trial judge. A summary of this presentation is set forth below.* The trial judge

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*THE COURT. I know what you are claiming in that regard. but when the credit was taken, that wiped out any indebtedness due Alburg Creamery from Falcone Dairy Products.

MR. ANOLIK. That is correct, your Honor, but that is not a concealment; that is a divulgence.

THE COURT. Isn't it a question for the jury to determine whether or not that was a false and fraudulent credit, or a legitimate credit?

MR. ANOLIK. I don't think so, your Honor. I don't think it has anything to do with this. That is a question of bookkeeping.

THE COURT. I don't think it is a question of bookkeeping, is it? It is a false and fraudulent entry.

correctly concluded that the underlying issue was whether the $210,000 was "a false and fraudulent entry" (Tr. 872) and in ruling on this issue, it is clear that the trial

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MR. ANOLIK. A false and fraudulent entry, your Honor, would mean you are going back to 1971, and you are trying to determine whether or not there was smelly cheese in 1971. The jury has no right to consider that in this case. I objected to it when it first came in, but it eventually came in, your Honor, how is that false or fraudulent in any shape or form? How is it relevant to the whole situation?

THE COURT. It is relevant if credit was taken for cheese which, in fact, or for whatever purpose, which, in fact, wasn't the product of Alburg Creamery, or wasn't the result of conditions, bad conditions and so on.

MR. ANOLIK. But there is no testimony about that, your Honor. The unrefuted testimony is that what happened in New York, Mr. Laramee testified he sent cheese down to New York, and he corroborated the fact that the runners or the invoices were, in fact, sent. He doesn't know what happened in New York from that point on in New York. You have had uncontradicted testimony that a large quantity of that cheese was unuseful; that is the only issue here and the credits were duly entered. There is no contradiction by Mr. Laramee of that fact. In effect, what he is saying, if they gave back money to these people, it wasn't because my cheese was smelly; he is not doubting they gave it back.

THE COURT. This is a factual determination, in my judgment, for the jury to determine. Now I think you can argue, as you have alleged to me, before the jury. You may argue persuasively before the jury, but I think this is a matter for the jury to determine. The facts are for the jury to determine beyond a reasonable doubt. (Tr. 872, 873)

* * *

The Court also made the following comment in denying defendant's motion at the end of the Government's case:

THE COURT. I appreciate your argument, Mr. Anolik. I do think it is a close question, but I do think it is a matter for resolution by the jury, and I think the jury, at this stage anyway, I think the jury, based on the evidence which has been adduced to date, can apply the traditional test. There is enough for the jury to apply the test of beyond a reasonable doubt. (Tr. 535)

judge used the proper test, viz: "This is a factual determination, in my judgment, for the jury to determine. Now I think you (defense attorney) can argue, as you have alleged to me, before the jury. You may argue persuasively before the jury, but I think this is a matter for the jury to determine beyond a reasonable doubt" (Tr.873)

In summary, the Government contends that there was ample circumstantial evidence from which the jury could find that the credits of $210,000, which "wiped out" Alburg's assets of $172,000, were false and fraudulent beyond a reasonable doubt, and that the "bad, fishy, rancid cheese" on which the credits were based did not exist. This conclusion is inferred from the fact that neither Leo Laramee, Alburg's manager, nor the cheesemaker, Warren Laramee, ever received complaints from Falcone and Curreri, though the defendants had claimed they had voiced repeated complaints to Leo Laramee; that admittedly, there was no fishy, rancid cheese shipped to Lucille Dairy by Alburg in 1971, yet Lucille received nearly one-half of Alburg's production; that the books of Falcone Dairy failed to

attribute these credits either to Alburg, or to bad cheese; and that the taking of the credits was delayed for more than two years without making a deferred accounting entry, indicating the existence of the same.

Accordingly, the Government urges that the trial judge properly determined that there was sufficient evidence for the jury to find the defendants guilty beyond a reasonable doubt, as required by the Taylor case. The trial judge properly denied defendants' motions for acquittal since the jury could reasonably conclude beyond a reasonable doubt that the 1971 bad cheese did not exist, that defendants' claimed credits in the amount of $210,000 based thereon were false, and that the claiming of the false credits in Alburg's bankruptcy proceedings was done by Falcone and Curreri to conceal the liability of Falcone Dairy to Alburg Creamery in the amount of $172,000 - $284,942.31.

POINT II THE ADV. E GIVEN TO THE DEFENDANTS BY THEIR ATTORNEY AND A CERTIFIED PUBLIC ACCOUNTANT DID NOT NEGATIVE DEFENDANT"S CRIMINAL INTENT

Defendant attempts to suggest that their order to their accountant Mario Accardi to record in the General Journal of Falcone Dairy Products, Inc. a $210,000 credit for defective cheese received from Alburg in 1971 showed they had no criminal intent and there was no concealment (DB 33) Defendants further attempt to suggest that the advice given them by the attorney for the bankrupt and the accountant Accardi, when taken together with the "full disclosure" of the $210,000 entry should have compelled the district court to grant their motion to dismiss the indictment. (DB34-36)*

Defendants concede that the advice of counsel is not a complete defense, but further this defense is only available:

> if a man honestly and in good faith seeks advice of a lawyer as to what he may lawfully do and fully and honestly lays all the facts before his counsel, and in good faith and honestly follows such advice, relying upon it and believing it to be correct, and only intends that his acts shall be lawful, he could not

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*Defendants also indicate that no creditor was damages by the credit since Falcone was insolvent, but whether this is true or not, and the Government contends strongly that it is not, it is not relevant to the issue of concealment.

> be convicted of crime which involves wilful and unlawful intent; even if such advice were an inaccurate construction of the law. But, on the other hand, no man can wilfully and knowingly violate the law, and excuse himself from the consequences thereof by pleading that he followed the advice of counsel.

Williamson v. United States, 207 U.S. 425, 453 (1908). (Emphasis added) The basic requirement that the attorney be presented with a complete, honest and full facts for the defense to apply is one of long standing. See, e.g., United States v. Channel Custer Wing Corps., 376 F.2d 675 (4th Cir. 1967); United States v. Cox, 348 F.2d 294 (6th Cir. 1965); United States v. Bisno, 209 F.2d 711 (9th Cir. 1961), cert. denied, 370 U.S. 952 (1962); United States v. McCormick, 67 F.2d 867 (2d Cir. 1933). In this case defendants told both attorney Wool and the accountant that Falcone Dairy Products had received $210,000 worth of bad cheese two years earlier in 1971 from Alburg Creamery, a contention which the Government proved was untrue. (Tr.380-82) In view of this incorrect assumption by the lawyer and accountant, the advice that credit could be taken for the bad cheese was incorrect since the credit did not exist and therefore the advice was not a defense in these proceedings.

POINT III STATEMENTS MADE BY BOTH DEFENDANTS TO F.B.I. AGENTS WERE PROPERLY ADMITTED

Defendants complain because they were interviewed by F.B.I. agents without being told this was a criminal investigation. This was correct as to some of the interviews, but makes no difference since there is no requirement that anyone be so informed.* Although the defendants were advised of their Miranda rights on some occasions, they were not so advised at all times. Nevertheless it is undisputed that at no time while being interviewed by the F.B.I. were the defendants subject to custodial interrogation or even in anyway not free to leave or stop the interview. The situation presented here was similar to that in United States v. Hall, 421 F.2d 540 (2d Cir. 1969), cert. denied, 397 U.S. 990 (1970) where the Court stated that for there to be custodial interrogation "in the absence of actual arrest something must be done by the authorities, either in their manner of approach or in the tone or extent of their questioning, which indicates that they would not have heeded a request to depart or to allow the suspect to do so." Id at 545. There was no such activity in this case, and the District Court, relying specifically on Hall found

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*Further, the New York F.B.I. agents conducting the interviews initially were not aware that the defendants were potential defendants. Tra 5, A 20; Tra 7, A 22; Tra 13, A 28.

the statements to be voluntary. (Tra 13) See United States v. Marcus, 401 F.2d 563 (2d Cir. 1968), cert. denied, 393 U.S. 1023 (1969); United States v. Messina, 388 F.2d 393 (2d Cir.) cert. denied, 390 U.S. 1026 (1968).

The statements made by Joseph Falcone were likewise found by the District Court to have been voluntary. Tr 13, A 90. The District Court did not elucidate in detail the basis of its finding, but a clear reading of the record reflects that the statements were not made with any understanding that they would not be used against the defendant nor that they were intended as attorney-client communications.* Tra 22, 28, 6-27, A 22, 41-42. The statements recorded by Agent Axten arose in the context of a desire by Agent Axten to interview Joseph Falcone, as he so advised his attorney, Joseph Wool. Tra 20, A 35.

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*It is noteworthy that although he testified at trial and practices in the city where the trial took place, attorney Wool was not called by the defendants to testify as to this situation nor asked about it at trial. The only statements on the record are representations made by Mr. Anolik of what attorney Wool had told him. See DB 16, 37; Tr 345, A 218.

Agent Axten indicated that this was a criminal investigation, that the interview pertained to entries in the books and records of Falcone Dairy Products, Inc. with respect to the bankruptcy and that Joseph Falcone would be advised of his rights if he was interviewed. (Tra 21, A 36.) Mr. Wool indicated he did not wish to have his client interviewed (Tra 25, A 40), and Agent Axten proceeded to ask some questions of Mr. Wool concerning the bankruptcy proceedings. (Tra 21, A 36) Nevertheless, and despite advice by Agent Axten to Falcone that he did not have to say anything (Tra 24, A 39), Joseph Falcone interrupted attorney Wool's responses and provided information directly to Agent Axten (Tra 22, A 37). At no time were the communications heard and recorded by Agent Axten directed at Mr. Wool nor apparently intended as attorney-client communications. (Tra 22, 26, 30, A 37, 41, 45) Nor was there any indication that the interview was off the record (Tra 26, 31, A 41, 46), but rather it appears that Falcone was trying to clarify statements made by his counsel to Agent Axten. Tra 30, A 45.

Under these circumstances it is inconceivable that Agent Axten should not have been permitted to testify as to what Falcone said.

POINT IV THE DISTRICT COURT CORRECTLY ADMITTED BANKRUPTCY DOCUMENTS AND STATEMENTS MADE BY THE DEFENDANTS

Defendants argue that the bankruptcy documents should not have been admitted since it was compulsory that they be filed. Defendants' argument is premised on Marchetti v. United States, 390 U.S. 39 (1968) and Grosso v. United States, 390 U.S. 62 (1968). Both cases are so totally inapposite to the facts here as to require no further discussion of their application. In addition, the documents apparently referred to by defendants did not contain any statements of the defendants which were in and of themselves incriminatory. Rather the documents were in some instances shown to be false and therefore a critical part of the Government's proof of false oath. The document objected to by the defendants on the grounds of Marchetti and Grosso was one which did not contain any statements of either defendant, but rather was intended only to show that defendant Falcone appeared at a particular bankruptcy hearing, and not what he said. (Tr 8-9, A 85-86.) Further, counsel for defendants withdrew his objection to its admission, as can be seen by the following exchange:

> [Mr. O'Neil]
> The next document is entitled Proceeding Memo in re: Alburg Creamery, Inc. and filed February 14, 1974.
>
> JUDGE MARRO. That document, I might state for benefit of the parties, is a document that has been reconstructed from the testimony that was taken, and those are my notes as to the proceeding.

MR. O'NEILL. As far as I know so far, this is the only one that might contain statements of the defendants in connection with---

MR. ANOLIK. The nature of the objection, among others, Judge, would be that this is in the nature of a compulsory appearance. They are directed to appear.

JUDGE MARRO. The officers are supposed to appear.

MR. ANOLIK. Not that focus was made of criminality. That I know. So they would not be a waiver of any rights of self-incrimination freedom to Marchetti v. United States and Grosso v. United States, 390 U.S. Reporter. That was the so-called gambling tax stamp case where they were directed to file certain criminatory information, and the Supreme Court ultimately ruled since it was compulsory, this could not be used against them.

THE COURT. Marchetti and Grosso, I think, would be distinguishable.

MR. ANOLIK. It might be.

THE COURT. We spent time with those two cases.

MR. O'NEILL. The purpose of our offering this particular document is as to the appearance of Mr. Falcone on that date in a bankruptcy related hearing held there. I believe he testified on that day. We don't know what his testimony was, nor is it incorporated here.

THE COURT. More-or-less to indicate he was there and did testify, is that right?

MR. O'NEILL. That is all, your Honor, to indicate his presence, and also the fact Mr. Schmucker was made Trustee on that day. The document doesn't contain any other statement by Mr. Falcone.

MR. ANOLIK. No problem.

Tr 8-9, A 85-86. The only objections to the documents which were reserved were that of relevency and materiality (Tr 7-8, A 84-85), which objections were covered later without any

reference to compulsory filing or self-incrimination. Tr 16-21. The claim is baseless and defendants have waived it irrespective of its validity.

Although defendants again refer to statements of the defendants testified to by the F.B.I., the points raised have already been covered by the Government under Point III with possibly one exception. Defendants apparently attempt to contend that 11 U.S.C. §25(a)(10) applies to the bankruptcy documents and statments given to the F.B.I. Section 25(a)(10) provides in relevant part:

> The bankrupt shall. . .at the first meeting of his creditors. . .[and at other times] submit to an examination. . .but no testimony, or any evidence which is directly or indirectly derived from such testimony, given by him shall be offered in evidence against him in any criminal proceeding. . .

There is nothing in the record of this case which in any way suggests that the Government used such testimony nor derived any evidence from such testimony. Statements to the F.B.I. certainly do not fall under 11 U.S.C. §25(a)(10), and in no way was it even intimiated during the trial that the interviews were based on statements made pursuant to 11 U.S.C. §25(a)(10).

POINT V THE OPENING AND CLOSING ARGUMENT OF GOVERNMENT'S COUNSEL WAS NOT IMPROPER AND DID NOT VIOLATE THE SPIRIT OF LAWN v. UNITED STATES, 355 U.S. 339, AS CLAIMED IN DEFENDANTS' BRIEF.

Point V of defendants' brief cites a variety of objections to the Government's opening and closing arguments. The Government submits that these objections are either groundless, or at best, constitute harmless error.

The only authority cited in conjunction with any of these objections to argument is the case of Lawn v. United States, 355 U.S. 339 (1968) which is cited in connection with defendants' claim that the Government's counsel, in rebuttal, gave "his own opinion as to the issues which the jury must resolve." (DB 43)

Regarding this specific claim of error, the record discloses that defense attorney commenced his argument by stating: "The Government must prove his guilt beyond a reasonable doubt; not by inferences, by evidence; not by surmise, but by evidence. They say that there is no evidence - mind you - evidence they say that bad cheese was received in 1971. We submit to you

they have proved nothing. There is uncontroverted evidence that bad cheese was received. They haven't introduced anything to show it was not received." (Tr. 931)

In his rebuttal argument, the prosecutor pointed out that defense counsel was in error in stating that there was "no evidence" of the non-existence of "bad cheese" and that the jury could consider reasonable inferences from certain circumstantial evidence. In making this argument, Government's counsel stated: (Tr. 964) ". . . and from circumstantial evidence, you can draw all the proper inferences which a reasonable person would draw, and so, once again, we ask you to draw those inferences, and we think if you draw(s) the proper inferences from the Government's case, you will find that it is absolutely incredible that this corporation, during the last six months of 1971, did have forty per cent rotten cheese. That is what the figures show right up there on the board. * * * We think you have got to find that as being absolutely incredible. * * * We think under the circumstances, that they just cannot be believed." (Tr. 965)

It is submitted that the prosecutors use of the phrase "we think" is not in violation of principle that the prosecutor should refrain from vouching for his evidence under the cloak of his office. It is submitted that the use of the phrase "we think" was no more than an inadvertent substitution of the phrase "we suggest," which was used in the rebuttal argument just prior to the use of the phrase "we think." (Tr. 964)

It is clear from Lawn v. United States, 355 U.S. 339, and Second Circuit cases implementing the same, that the remark was in no way an attempt by the prosecutor to present his own personal judgment of the evidence based on his own personal knowledge or experience, rather than the evidence at the trial. In United States v. Grunberger, 431 F.2d 1062, 1068 (2d Cir. 1970) the Court points out that the objectional nature of a prosecutor's assertion of his own personal belief in argument, is where the prosecutor asserts a statement of belief not based on the evidence, but on personal knowledge or experience outside of the record. (Id. at 1068) Similarly, in United States ex rel Haynes v. McKendrick, 350 F. Supp. 990 (1972) Judge Motley, in implementing Lawn and Grunberger, supra, stated:

> The prosecutor's comments evincing his personal belief that petitioner testified falsely at the trial are also challenged. Some of these remarks * * * were simply an avertment of belief based on the evidence addressed at trial and were, therefore, not wholly improper in the absence of any intimation that they were founded on personal knowledge or matter not in evidence. Id. at 996.

Accordingly, the Government contends that the prosecutor's use of the words "we think" was not error, and fully complied with the court's guidelines as set forth above.*

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*In making a similar objection, defendants' brief (P. 43) asserts "the United States Attorney stated what he personally believed, saying ". . . I believe, Mr. Falivene who said he was close to the defendants . . ." This objection is wholly groundless when viewed in context with that part of the prosecutors statement omitted from defendants brief. The full statement reads: "I am talking about the Campagna Brothers who had a franchise in the defendants business; I am talking about, I believe, Mr. Falivene who said he was close with the defendants and wanted to get along with everybody." (Tr. 976) It is clear that this was not a statement of belief in the evidence but a mere parenthetical term used by the prosecutor while he was searching his mind for the name "Falivene."

In addition to the foregoing, the defendants brief cites several miscellaneous objections during the Government's opening and closing arguments, without citing any authority in support of the objections. These objections, separately discussed below, are without merit for the following reasons:

(1) Objection was made to the prosecutors statement that the legal opinions of defendants attorney and accountant "don't have anything to do with the case. This was obviously a preliminary statement of the prosecutor, and was explained by his further argument that the real question revolved around the issue of whether there was "bad cheese." (Tr. 895)

(2) The prosecutor's reference to the fact that "Mr. Wool's lips were sealed by the attorney-client privilege (Tr. 896) was never shown to be prejudicial, and any error stemming therefrom was cured by the explanatory statement of the presiding judge. (Tr. 898)

(3) The defense brief (P. 43) also claims that the prosecutor, in rebuttal, referred to a witness who had not been mentioned by defense counsel in his argument. Government counsel properly explained the purpose of this argument, namely, the witness gave relevant testimony to rebut defendants' claim that the cheese was bad. (Tr. 975)

(4) The defense brief also cites three instances where defense counsel objected to the prosecutor's statement that certain witnesses had not been produced by the defense, namely, bookkeepers and warehousemen. (Tr. 906 and 915) It is clear that this was not error under the standards of this circuit. Reversible error results only when the comment has the effect of obtaining knowledge directly from the defendants. United States v. Lipton, 467 F.2d 1161, 1168 (2d Cir. 1972). This test was more recently upheld in a case where Government counsel commented that the brother of a defendant did not testify to contradict a government witness (United States v. Tramunti, 513 F.2d 1087, 1119 (2d Cir. 1975)).

The rule is similarly stated in United States v. Dioguardi, 492 F.2d 70, 82, citing United States ex rel Leak v. Follette, 418 F.2d 1266 (2d Cir. 1969): ". . . we reviewed the many precedents which, in almost every instance, have held that remarks concerning lack of contradiction are forbidden only in the exceedingly rare case where the defendant alone could possibly contradict the Government's testimony." (Id. at 82)

Accordingly, there was no error in the prosecutor commenting on the failure of certain witnesses to testify.

Defendants' brief further alludes to the fact that the Government's closing argument was not rebuttal. This point has not been pursued in defendants' brief nor on the record below.

Based on the foregoing, it is submitted that Government's argument was proper in all respect.

POINT VI THE INDICTMENT WAS VALID AND THE GOVERNMENT'S PROOF WAS IN ACCORDANCE WITH THE INDICTMENT

Rule 7(c) of the Federal Rules of Criminal Procedure provides that an indictment shall be "a plain, concise and definite written statement of the essential facts constituting the offenses charged." The standard for an indictment is as follows:

> An indictment need only provide sufficient detail to assure against double jeopardy and state the elements of the offense charged, thereby apprising the defendant of what he must be prepared to meet. United States v. Salazar, 485 F.2d 1277 (2d Cir. 1973), cert. denied, 415 U.S. 985. Under this test, an indictment need do little more than to track the language of the statute charged and state the time and place (in approximate terms) of the alleged crime, United States v. Fortunato, 402 F.2d 79, 82 (2d Cir. 1968), cert. denied, 394 U.S. 933. . . .1969; United States v. Palmoiotti, 254 F.2d 491, 495 (2d Cir. 1968), although in the case of a conspiracy it has been held that at least one overt act must be set forth.

United States v. Tramunti, 513 F.2d 1087, 1013 (2d Cir.), cert. denied, 96 S. Ct. 54 (1975). An examination of the superseding indictment, and not that contained in defendant's appendix, illustrates on its face that the indictment complies with the requirements for sufficienty.*

Defendant moved pre-trial for dismissal of the indictment, and specifically count V on grounds similar to those espoused here. The District Court denied the motion with leave for defendants to file a memorandum in support of their position within one week if they wished to do so. Trb 28 No memorandum was ever filed.

Further, the Government filed a bill of particulars in this case indicating what the time frame was with each particular count as well as some explanation of the Government's theory of the case.

While it is true the indictment contained no reference to "bad cheese," the Government knows of no reason why this should have been included. The Government's theory from the opening statement through the close of the evidence was that the defendants had fraudulently entered a credit for $210,000 in their books to which they were not entitled, and which credit was used by the defendants to offset accounts receivable owing from Falcone Dairy Products to Alburg Creamery. Defendants efforts to suggest that the Government shifted theories are totally baseless, as can be viewed in part by the lack of any references by the defendants to the transcript or documents to show where this took place.

While it is correct that count V of the indictment, the conspiracy count, charged that the conspiracy began on or about December 1, 1970, the proof of the nonexistence of bad cheese in 1971 clearly was appropriate both to show a conspiracy which began in 1971 to list large amounts of cheese on the books of Falcone Dairy as being bad cheese and chargeable to Alburg, as well as to show that the credit claimed by the defendants did not exist and therefore the documents filed in bankruptcy were false and fraudulent.

Even to the extent that the Government did not show a conspiracy in 1971, the Government need only show the existence of a conspiracy at some point in time over the period specified in the indictment. Arnold v. United States, 336 F.2d 347 (9th Cir. 1964). A conspiracy unquestionably was shown during late 1973 and into 1974 when the false documents were filed with the bankruptcy court.

CONCLUSION

The conviction of the defendants Falcone and Curreri should be affirmed as to all counts.

Respectfully submitted,

GEORGE W.F. COOK
United States Attorney for
the District of Vermont
Attorney for the United
States of America

JEROME F. O'NEILL
Assistant U.S. Attorney
September 24, 1976

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA — Docket No. 76-1237
Appellee

v.

JOSEPH FALCONE and
JOSEPH CURRERI

Appellants

CERTIFICATE OF SERVICE

I hereby certify that I have this 27th day of September, 1976, mailed a copy of the attached Brief and Appendix to Irving Anolik, Esq., counsel for Appellants, postage prepaid, 225 Broadway, New York, New York 10007.

George W.F. Cook
United States Attorney

Enclosures (2 each)